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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC. and STATE INSURANCE FUND,
Petitioners,

—v.—

RALPH CAPUTO,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

No. 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

—v.—

CARMELO BLUNDO,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED BRIEF FOR RESPONDENTS RALPH CAPUTO AND CARMELO BLUNDO

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ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED BRIEF FOR RESPONDENTS RALPH CAPUTO AND CARMELO BLUNDO

Counterstatement of Question Presented

Are the Findings and Decisions of the Administrative Law Judges, the Benefits Review Board and the Second Circuit Court of Appeals correct in holding that the individual Respondents, Carmelo Blundo and Ralph Caputo, are covered employees under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act?

Counterstatement of the Case

Ralph Caputo and Carmelo Blundo (hereinafter referred to as Caputo and Blundo) were employees of the Northeast Marine Terminal Co., Inc. and the International Terminal Operating Co., Inc., respectively, at the time when they were injured while in the course of their employment. These cases are, therefore, workers' compensation claims and were processed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as LHCA or the Act) as amended by Congress, 33 U.S.C. 901 et seq. In each claim the employee was found by an Administrative Law Judge (hereinafter referred to as ALJ) to have sustained a compensable injury under the LHCA (Caputo Pet. 51a, Blundo Pet. 49a, 60a).[1]

The Compensation Orders of the respective ALJs were appealed to the Benefits Review Board (hereinafter referred to as the BRB or the Board). The Board affirmed the decisions in all respects (Caputo Pet. 47a, Blundo Pet. 45a). Petitions for review were filed with the Court of Appeals for the Second Circuit, which by a divided Court,

[1] The designation "Caputo Pet." refers to the appendix to the Petition for a Writ of Certiorari in No. 76-444 and "Blundo Pet." refers to the appendix to the Petition in No. 76-454. The designation "A" refers to the Consolidated Appendix filed herein.

affirmed the determinations of the BRB (Caputo Pet. 1a, 56a, Blundo Pet. 1a). A petition for rehearing made by the Petitioner in the Caputo case was denied by the Court of Appeals (Caputo Pet. 59a) and thereafter a Petition for a Writ of Certiorari was filed on September 27, 1976 in the Caputo case (76-444) and on September 28, 1976 in the Blundo case (76-454). Both Petitions were granted on December 6, 1976 and the cases were consolidated for argument.

The factual circumstances surrounding the injuries sustained by each employee are as follows:

1. *Ralph Caputo*: The facts stipulated by both sides (A 4-7) are that Mr. Caputo was injured on April 16, 1973 while in the employ of Northeast Marine Terminal Co., Inc. (hereinafter referred to as Northeast). At the time of the injury, Mr. Caputo was working within the terminal area (adjacent to navigable waters of the United States) maintained by Northeast, handling cargo that had been offloaded from a Yugoslavian ship approximately five days prior to the accident. When Mr. Caputo was injured, he was loading a consignee's truck with boxes of cheese (A 39) which had been put on a dolly inside of the truck by a fellow longshoreman operating a forklift machine. While pulling the dolly loaded with cheese back into the truck he hit a backstop and fell and injured his left foot and back (A 28). Northeast concedes that Caputo met the situs requirements of the Act in its brief at page 3, footnote #1.

The factual record developed by Caputo's testimony, uncontradicted by Northeast, indicated that he was regularly employed as a longshoreman to work aboard vessels as a holdman (A 9) as part of a regular gang for Pittston Stevedoring (A 10). When there is no work available to him he then shapes-up at a hiring hall maintained by the New York

Waterfront Commission and is hired out by other stevedoring companies or terminal operators, wherever work is available (A 14). The duties of a terminal labor employee, also known as extra-labor, are to load and unload trucks which arrive at the employer's terminal and which bring cargo for overseas shipment or pick up cargo that was unloaded from a vessel within the terminal area, to load and unload barges and lighters that are afloat, and to load and unload ships' stores (A 8). Mr. Caputo had been engaged in this type of activity for the past twenty years on and off for Northeast (A 22) and that while so engaged he worked approximately 20% of his time aboard barges, lighters and ships (A 25-26) and 80% within the terminal area in the preparation for waterborne cargo to be shipped overseas and effecting delivery of imported cargo to consignees' truckmen. All of the work is done within the marine terminal area maintained by Northeast at 39th Street, Brooklyn, New York and all of the ships are loaded or unloaded alongside the terminal.

Mr. Caputo considers himself to be a longshoreman (A 7). He also considers that the terminal labor work he performs is "dock work" (A 8-9). At the time of the accident, he was asked by his "checker" (A 27) to load the Tomaselli truck, an outside independent carrier.

Mr. Caputo was paid compensation for his lost time, as well as for 15% permanent partial disability of the left foot as directed in the Order of the ALJ (Caputo Pet. 54a-55a). This payment must be made by the employer and/or its insurance carrier, notwithstanding an appeal taken in the case as provided by the amended Act, 33 U.S.C. 921(b)(3).

2. *Carmelo Blundo*: The stipulated record in the Blundo case indicates that the parties agreed that the employee, Mr. Blundo, was injured on January 8, 1974 while in the employ of the Petitioner, International Terminal Operating Co., Inc. (hereinafter referred to as I.T.O.). The injury occurred at I.T.O.'s pier facility at 21st Street, Brooklyn, New York (Blundo Pet. 51a) and that the area runs approximately 1,000 feet from 21st Street to 19th Street, and extends approximately 700 feet from the gate entrance to the water's edge (A 62-63).

The testimony of Mr. Blundo shows: that he was employed as a checker by I.T.O. for approximately five years (A 60-61, 63); that approximately 20% of his time was spent actually on board vessels (A 67); and that on the day he was injured, Mr. Blundo was working on the 19th Street side of the pier, approximately 30 to 40 feet from the water's edge (A 69). He was checking cargo being unloaded (stripped) from a container alongside a bonded warehouse under the supervision of the U.S. Customs Agents (A 69). The purpose of this procedure was to make sure U.S. Customs duties due were paid before a consignee picked up imported cargo (A 73) located at this facility (A 29, 71, 80). While the container was being stripped, Blundo slipped on ice on the ground and fell (A 74), sustaining injuries.

It is the business of I.T.O. to load and unload cargo from ships and in that capacity it engages longshoremen to work both on the vessels and on the dock (A 64). Mr. Blundo does not know in advance each day where he will be assigned to work and even during the day, his work assignment may vary. In any event, his work activities would involve the checking of cargo that was either discharged

from a vessel or about to be loaded on a vessel, or he would actually work on board the vessel itself.

The container involved at the time of the accident had been unloaded at a pier facility, not located in Brooklyn (A 70), from a vessel owned by the American Export Lines, and was transported overland by an independent trucking company to the 21st Street pier where it had to be put into a bonded warehouse (A 71, 76-77). At the time that the checker is tallying the cargo, he has a manifest sheet in his possession which indicates the name of the consignee, the cargo, the amount of cargo and the name of the ship on which it had been transported (A 86, 87). The container had not been opened by anyone prior to the time it was received by I.T.O. at the 21st Street pier facility. The seal had to be broken and shown to a Customs Agent (A 87). Mr. Blundo was the first person to break the seal that had been placed on the container in a foreign port. The reason that the container must be stripped is to segregate cargo contained therein to effect delivery to multiple consignees (A 89). The consignee's truckman would pick up said cargo at the 21st Street Terminal.

The method of discharging a container vessel was confirmed by I.T.O.'s witness, Mr. Cash (A 106). The container is removed from the vessel and then landed on a string piece. The container is then moved to a warehouse where it is stripped so that delivery of the cargo that is stowed within it could be effected to multiple consignees. If the entire cargo in a container is destined for one consignee, then this container is not stripped, but nevertheless delivery is effected when the consignee's truckman picks it up within the terminal area maintained by the stevedoring

company and/or terminal operator. Each and every time a consignee's truckman picks up cargo for further transshipment from the terminal area, there must be a checker present in order to tally the cargo delivered and to have a receipt signed for same by the truckman (A 112). This checker works with a hilo driver and a so-called legman, who does the actual physical work of lifting the individual cases of cargo. The legman, the hilo driver, as well as the checker, are all known as longshoremen. They are also referred to as longshoremen by the employer, as well as by the employees themselves.

I.T.O. is not in the warehousing business, per se. There is no charge made for warehousing any cargo (A 118) that is handled by I.T.O. when it is discharged from a vessel or when it is received for the purpose of being put on board a vessel. There must be an enclosed area wherein this cargo has to be unloaded or stripped from a container in order to protect it from the elements and this area is called a warehouse. In the event that a consignee delays in picking up cargo that has been received by I.T.O. beyond the so-called free-time period, then there is a demurrage charge levied against the consignee by reason of the fact that he is utilizing pier facilities for storage beyond the free-time allotted (A 118).[2]

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[2] I.T.O. is as much in the warehousing business as is a Post Office. Both receive goods (one cargo, the other mail) intended for further shipment. While the goods are in the custody of each, they must be protected from the elements. Pending further shipment, the goods are temporarily stored or held in a Post Office or in the so-called warehouse or storage shed in the terminal area.

Summary of Argument

These cases involve an interpretation of the 1972 Amendments to the LHCA. The Act is a workers' compensation law, i.e. remedial legislation, which should be liberally construed in favor of claimants to effectuate its humanitarian purposes. Doubts, both legal and factual, should be resolved in favor of claimants. Further, the Act should not be narrowly or technically construed.

Petitioners herein seek review of determinations of an administrative agency, the BRB. The scope of review of agency determinations by a Court is strictly limited by what is generally known as the substantial evidence test. The determination should be affirmed unless the determination is unsupported by substantial evidence, is irrational or is forbidden by law. The BRB has adopted a consistent, rational interpretation of the 1972 Amendments and this interpretation should be accorded great weight.

To further effectuate its purposes, the Act contains certain presumptions in favor of a claimant. These presumptions can be rebutted by an employer only by the presentation of substantial evidence that coverage under the Act does not extend to the particular injured employee. Petitioners failed to present such evidence and, at most, in Respondents' opinion, have presented a legal theory which has no support in either the language of the Amendments or the legislative history.

Respondents believe the 1972 Amendments adopted a two pronged test to determine coverage under the Act. The first involves a determination of an employee's "status"

and the second involves the "situs" where the accident occurred.

The Amendments extended coverage to all employees engaged in maritime employment, specifically including longshoremen and other persons engaged in longshoring operations. While these terms are not defined in the Act, looking to other sources it is submitted that longshoremen do more than simply load and unload a vessel between the ship and a "point of rest" as contended by Petitioners. They move, handle and process cargo through a waterfront facility from the time a truck stops at the terminal with goods to be loaded aboard a vessel until a truck leaves the terminal loaded with cargo that was discharged from a vessel. Similarly, longshoring operations are those performed by longshoremen moving, handling and processing the cargo between the terminal area and the vessel, as well as those additional operations necessary to the moving of the cargo, such as those of a checker tallying cargo. Further, with the advent of containerization, a modern cargo handling technique, the stripping and stuffing of a container has become the functional analogue to loading and unloading a vessel. Under this interpretation of the Act, both Respondents, Caputo and Blundo, are engaged in longshoring operations and are thus engaged in maritime employment.

Petitioners attempt to limit maritime employment by a "point of rest" theory. Such a theory finds no support in the language of the Act, nor in the legislative history. This theory has been expressly rejected by at least four Courts of Appeals. Such a theory improperly reads language into the Amendments not used by the Congressional Committees in their reports and not used by Congress in the Amend-

ments. Further, the theory creates an arbitrary division of longshoring activities occurring in a waterfront terminal and thus destroys the very uniformity of coverage Congress intended to create. This Court should not legislate a standard which Congress did not adopt.

The second test of coverage under the Amendments is an expanded situs test. No longer are navigable waters limited to those areas seaward of the shoreline. Now navigable waters specifically include (for the purposes of this Act) any adjoining pier, wharf, dry dock, terminal, building way and marine railway. Also included are "any other adjoining areas customarily used by an employer to load and unload vessels." The latter phrase does not limit the first as contended by Petitioners. Rather Congress meant to include all the specifically enumerated areas, as well as any additional area customarily used to load and unload vessels. Even if the "customarily used to load and unload" language does limit the enumerated areas to those so used, the areas involved in these cases were so used. Stripping and stuffing containers are functionally equivalent to loading and unloading a vessel and Respondent Blundo was involved in the stripping of a container. Thus Respondent Blundo met the situs test.

ARGUMENT

I.

In dealing with compensation law there are a number of basic legal doctrines and statutory requirements which must be followed.

The LHCA is remedial legislation which should be liberally construed in favor of the claimant, e.g. *Voris* v. *Eikel,* 346 U.S. 328 (1953); *Reed* v. *The Steamship Yaka,* 373 U.S. 410, rehearing denied 375 U.S. 872 (1963). In order to effectuate the humanitarian purposes for which the Act was enacted, doubts, both legal and factual, are to be resolved in favor of injured employees, *Friend* v. *Britton,* 220 F.2d 820 (D.C. Cir.), cert. denied sub nom. *Harry Alexander, Inc.* v. *Friend,* 350 U.S. 836 (1955); *Potomac Electric Power Co.* v. *Wynn,* 343 F.2d 295, 299 (D.C. Cir. 1965); *Young & Co.* v. *Shea,* 397 F.2d 185, 188, rehearing denied 404 F.2d 1059, 1061-62 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969); *Continental Insurance Co.* v. *Byrne,* 471 F.2d 257, 260-61 (7th Cir.), cert. denied, 406 U.S. 918 (1972).

Further, the scope of review of administrative determinations is generally limited on appeal. The BRB is specifically limited by the amended Act under 33 U.S.C. 921(b)(3):

> "The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party-in-interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the

> decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole . . ."

It is thus evident that the BRB's power under the Act is strictly to review the factual record and the conclusions reached by the ALJ. If the decision of the ALJ is supported by substantial evidence, the BRB must affirm it. Upon further review by a Court, administrative findings may not be disturbed unless they are unsupported by substantial evidence on the record considered as a whole, *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 508 (1951); *Banks* v. *Chicago Grain Trimmers Assn.,* 390 U.S. 459, 467 (1968); *Young & Co.* v. *Shea, supra.* An agency's decision cannot be disturbed unless it is irrational or forbidden by law, *O'Keefe* v. *Smith Associates,* 380 U.S. 359, 363 (1965); *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U.S. 469, 478 (1947). A reviewing court may not set the determinations aside because it would weigh or appraise the evidence differently, so long as the record considered as a whole contains substantial evidence to support said determinations, *Norton* v. *Warner Co.,* 321 U.S. 565, 568 (1944).

Although the above cases dealt with the pre-1972 Act, the same standards apply to review under the amended Act. The new Act substituted the ALJ for the Deputy Commissioner who acted as the administrative quasi-judicial officer and rendered initial decisions on disputed cases. The Board replaced the U.S. District Courts in order to create an internal administrative appeal. Notwithstanding the fact that the Act does not refer to the scope of judicial review, the legislative history of the Amendments clearly

shows the same standard of review under the amended law was intended, see *Offshore Food Service, Inc.* v. *Benefits Review Board,* 524 F.2d 967 (5th Cir. 1975); *Potenza* v. *United Terminals, Inc.,* 524 F.2d 1136 (2nd Cir. 1975); and *Nardella* v. *Campbell Machine, Inc.,* 525 F.2d 46 (9th Cir. 1975).

A reviewing court should give deference to a consistent and reasonable interpretation of a statute by the agency charged with its administration, *Johnson* v. *Robison,* 415 U.S. 361, 367-8 (1974). As will be shown below, the determinations of the BRB that Respondents are covered employees is not erroneous and should be upheld, *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

With particular reference to the "coverage" provision under the Act, there is an express statutory presumption that the claim comes within this provision, 33 U.S.C. 920 (a); see *Cardillo* v. *Liberty Mutual Insurance Co., supra,* at 474; *Overseas African Construction Corp.* v. *McMullen,* 500 F.2d 1291, 1296 (2d Cir. 1974). This statutory requirement should be read expansively so as to permit the broadest coverage that the Act permits, *Calbeck* v. *Travelers Ins. Co.,* 370 U.S. 114, 130 (1962); *Michigan Mutual Liability Co.* v. *Arrien,* 344 F.2d 640, 645-6 (2nd Cir.), cert. denied, 382 U.S. 835 (1965).

Further, the effect of Section 920 is to place the burden of proof on the employer, *Wheatley* v. *Adler,* 407 F.2d 307 (D.C. Cir. 1968); *Travelers Insurance Company* v. *Donovan,* 221 F.2d 886 (D.C. Cir. 1955). It is the legal obligation of the employer to present evidence to meet the presumption that the claim comes within the provisions of the Act. However, merely presenting evidence to meet the presump-

tion is insufficient. An employer and/or its insurance carrier can overcome this statutory presumption only when it introduces substantial evidence to the contrary, *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935); *Liberty Mutual Insurance Co.* v. *Gray,* 137 F.2d 926 (9th Cir. 1943); *Butler* v. *District Parking Management Co.,* 363 F.2d 682 (D.C. Cir. 1966).

Only when substantial evidence is presented is the presumption overcome and no longer controlling on the result, *John W. McGrath Corp.* v. *Hughes,* 264 F.2d 314 (2nd Cir.), cert. denied, 360 U.S. 931 (1959). An employer must produce facts, not speculation, to overcome the presumption of compensability, and reliance on mere hypothetical possibilities in rejecting a claim is contrary to the presumption created in Section 920(a), *Steele* v. *Adler,* 269 F. Supp. 376 (D.D.C. 1967).

Judge Friendly, in his opinion below, remarked on the unsatisfactory state of the record, *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 47 (2nd Cir. 1976). Respondents contend that each question raised by Judge Friendly was one which could have and should have been answered by Petitioners. They should have presented evidence at the trial before the ALJ that the claims do not fall within the provisions of the Act. All that they have done is to argue for a legal theory that we will show has no basis in the Act nor in the legislative history. Petitioners have simply failed to meet their burden of proof to introduce evidence, substantial or otherwise, to overcome the presumption. This Court is urged not to make any decision contrary to long accepted legal doctrine on the presumption in favor of injured employees.

Furthermore, claimants, because of the presumptions, need not meet the preponderance of the evidence standard

required in civil trials, *Strachan Shipping Co.* v. *Shea,* 406 F.2d 521 (5th Cir.), cert. denied, 395 U.S. 921 (1969). They need only meet a less stringent burden of proof in order to shift the burden to the employer, who is best able to meet the financial expense in connection therewith. Claimants in the cases on review more than met their respective burdens of proof.

II.

The decision of the Second Circuit Court of Appeals holding that Ralph Caputo and Carmelo Blundo come within the amended provisions of the Act is correct.

All of the parties participating in these cases are in agreement that the amended Act intended to provide expanded coverage to longshoremen who are engaged in maritime activity working within a terminal area or on the dock.

Prior to the 1972 Amendments, it had been consistently held by the Courts that LHCA benefits were applicable only to those employees who are engaged on board a vessel over navigable waters of the United States in the performance of their duties in the loading and discharging of vessels, *Nacirema Operating Co., Inc.* v. *Johnson,* 396 U.S. 212 (1969); and *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 (1971). This created an inequity among workers for the same employer, some of whom may have been injured while working on board a vessel and others who may have been injured on the dock in the performance of their tasks as longshoremen. An employee injured on the vessel would be paid under the LHCA, whereas an employee who was injured on the dock would be paid under the compensation laws of the State wherein the pier was located. In many instances, this created a gross disparity of benefits to the

group of employees who worked on the dock, essentially doing the same type of work for the same employer, as opposed to the employees who worked on the ship.

Prior to 1972, the shoreside longshoremen in many cases brought third-party actions based on unseaworthiness against shipowners, who in turn impleaded the employer, *Seas Shipping Co., Inc.* v. *Sieracki,* 328 U.S. 85 (1946); *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956). It was the employer's lament that in the end they were paying for compensation and third-party liability.

In order to eliminate the plethora of litigation and to provide increased benefits for all longshoremen generally, and in order to make applicable to all longshoremen a uniform compensation Act, the Amendments, effective November 26, 1972, were enacted by Congress. The provisions of these Amendments provided for two very important and substantial benefits to injured employees, as well as to stevedoring companies and the terminal operators. The new Act eliminated the injured employee's third-party right to sue the shipowner on the theory of unseaworthiness. The new Act also specifically eliminated the right of the shipowner to implead the stevedore or terminal operator. This provision was a great benefit to the stevedoring company or terminal operator because of the fact that in third-party cases the stevedoring company or terminal operator could not now be impleaded by the shipowner. In exchange, the injured employee was given a substantial increase in compensation benefits from a monetary point of view, and in addition, the new Act sought to rectify the injustice of having multiple compensation laws applicable to injured employees who are essentially doing the same type of work. The new Act specifically recognized that more longshoring

work and operations are conducted within the terminal area than are done on board ship by reason of the container method of shipment that had been introduced and is now widely used throughout all of the ports of this country, Sen. Rep. No. 92-1125, 92nd Cong. 2d Sess. p. 13; H.R. Rep. No. 92-1441, 92nd Cong. 2d Sess. p. 10.

Suffice it to say that there was a quid pro quo in that the longshoremen gave up an important third-party right on the basis of unseaworthiness in exchange for increased benefits and expanded coverage and the employers obtained a benefit under the amended Act in that shipowners could no longer implead them in third-party actions, see decision below, *Pittston Stevedoring, supra,* 544 F.2d at 47.

A. *Both Caputo and Blundo Were Engaged in Maritime Employment.*

The relevant language of the amended Act, 33 U.S.C. 902(3), is as follows:

> "Employee means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . "

It appears immediately upon a reading of this section that it is not necessary for this Court to provide a comprehensive definition of maritime employment. If Respondents, Caputo and Blundo, are found to be either longshoremen or other persons engaged in longshoring operations, they must be deemed covered employees since these persons are specifically included within the meaning of maritime employment. The use of the word "include" in a definitional section of a statute usually is a term of enlargement and not limitation, see *Federal Land Bank* v. *Bismark Lumber Co.,* 314 U.S. 95, 99-100 (1941). Indeed, as noted in a leading treatise:

"It is evident that the intent of Congress in defining the term employee as it has in this Act is to include within the coverage of the Act all maritime employees, other than those specifically excluded. In order to leave no room for any doubt, longshoremen and persons performing longshoring operations are specifically included, and so are harbor workers, ship repairmen, shipbuilders and shipbreakers so that in the case of such persons it is quite unnecessary to engage in any abstract discussion of the meaning of the term 'maritime employment' . . . " 1A Benedict on Admiralty Sec. 16 (7th ed. (rev.) 1973)

Reference to the legislative history should not be necessary if the statute is clear and unambiguous, *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); see also the dissent of Judge Craven, *I.T.O. Corp.* v. *Benefits Review Board,* 529 F.2d 1080, 1094 (4th Cir. 1976). We agree with Judge Friendly below that the phrase "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . " 33 U.S.C. 902(3), "is to be construed no differently than if it said any longshoreman or other person engaged in longshoring activities or engaged in other maritime employment." *Pittston Stevedoring, supra,* 544 F.2d at 52. Thus the issue is simply whether Respondents were either longshoremen or engaged in longshoring operations while in the employ of Petitioners. To exclude a longshoreman from coverage would negate the express language of the Amendment.

The Act is unfortunately silent on a definition of what a longshoreman is or what longshoring operations are. Petitioners argue that a "point of rest" theory limits the definition of these terms. Petitioner in the Blundo case, as well as the Amicus Curiae for Petitioners, attempt to make their

position more credible by the constant repetition that longshoring activities are strictly limited to loading or unloading a vessel under their "point of rest" theory.

Contrary to Petitioners' assertions, a longshoreman is generally deemed to be a laborer employed about a waterfront facility moving, handling and processing cargo. In *Intercontinental Container Transport Corp.* v. *New York Shipping Association,* 426 F.2d 884 (2nd Cir. 1970), the Court said:

"Historically, the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to trucks or other carriers." (at 886)

And, in *Humphrey* v. *International Longshoremen's Association,* 401 F. Supp. 1401 (E.D. Va. 1975), the Court found:

"For several decades, employees represented by the ILA have performed essentially all of the labor required in loading and unloading cargo at piers and waterfront terminals in the port of Hampton Roads. This work included cargo repair and maintenance, the preparation of cargo for loading, the sorting of cargo according to consignees and types, and the delivery of cargo to trucks or other inland carriers, as well as the physical loading or unloading of cargo ships." (at 1406)

Definitions of "longshoreman" appear in the Bi-State Compact creating the Bi-State Waterfront Commission, approved by Congress, 67 Stat. 541, August 12, 1953. The first definition appears as follows:

"'Longshoreman' shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or

(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores, or

(c) to supervise directly and immediately others who are employed as in subdivision (a) of this definition." 65 McKinney's Unconsolidated Laws Sec. 9806.

A further definition appears as follows:

"'Longshoreman' shall also include a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal

(a) either by a carrier of freight by water or by a stevedore physically to perform labor or services incidental to the movement of waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, including, but not limited to, cargo repairmen, coopers, general maintenance men, mechanical and miscellaneous workers, horse and cattle fitters, grain ceilers and marine carpenters, or

(b) by any person physically to move waterborne freight to or from a barge, lighter or railroad car for transfer to or from a vessel of a carrier of freight

by water which is, shall be, or shall have been berthed at the same pier or other waterfront terminal, or

(c) by any person to perform labor or services involving, or incidental to, the movement of freight at a waterfront terminal as defined in subdivision (10) of this section."

65 McKinney's Unconsolidated Laws Sec. 9905(6).

From these sources it is clear that longshoremen do more than load and unload a vessel. They move, handle and process waterborne cargo, from the time it comes into a waterfront terminal until it is put on board a vessel and from the time it is unloaded from a ship until it leaves the terminal, see *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs,* 540 F.2d 629 (3rd Cir. 1976).

Similarly, "longshoring operations" is not defined by the Act, but again the term is not limited to simply the loading and unloading of a vessel up to the "point of rest." "Longshoring operations" is a comprehensive term and involves a continuous process by which waterborne cargo moves through a waterfront terminal until it is fully loaded on board a vessel, or in the case of the removal of waterborne cargo from a vessel until it is delivered to the consignee's truckman.

Petitioners attempt to limit the meaning of maritime employment to simply loading and unloading of vessels in a direct line from the ship to the first "point of rest" or from the last "point of rest" to the ship. Nowhere in the use of the term maritime employment in the Act is there a limitation to loading and unloading. The only places in

the relevant sections of the Act where the terms loading or unloading are used are in the sections expanding the meaning of navigable waters, 33 U.S.C. 903(a), 902(4). Nevertheless, Petitioners use the loading and unloading language which Congress used to expand the navigable waters covered under the Act to limit the term maritime employment. This reading and/or interpretation is simply erroneous.

Even if the loading and unloading language is to be made a part of the definition of maritime employment, the terms are not words of art and should not be narrowly or hypertechnically interpreted, see *Litwinowicz* v. *Weyerhaeuser Steamship Co.*, 179 F. Supp. 812 (E.D. Pa. 1959); *Hagans* v. *Ellerman & Bucknall Steamship Co.*, 318 F.2d 563 (3rd Cir. 1963); *Garrett* v. *Gutzeit, O/Y*, 491 F.2d 228 (4th Cir. 1974). Further, a narrowly technical construction of the LHCA has been traditionally disfavored, see, e.g. *Luckenbach S.S. Co.* v. *Norton*, 106 F.2d 137, 138 (3rd Cir. 1939). The Court in the *Litwinowicz* case said:

> "Plaintiffs' actions at the time of the accident were direct, necessary steps in the physical transfer of the steel from the railroad car into the vessel, which constituted the work of loading." (179 F. Supp. at 817).

It should be noted that the plaintiff in this case was actually injured while inside the railroad car. Faced with the converse, the Court probably would have said that the work of unloading extends from removing the steel from the vessel to placing it inside the railroad car.

Petitioner in Caputo argues that Caputo was not engaged in maritime employment because the cargo was not in mari-

time commerce. We disagree. The obligation to unload a vessel is not terminated upon placing the cargo at a "point of rest" within the terminal area, but rather that cargo must be made available to a consignee so that it can be readily removed from the terminal area, see *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F.2d 887 (D.C. Cir. 1962). Respondent Caputo was completing the last necessary phase of unloading the vessel when he was placing the boxes of cheese within the consignee's truck when he sustained his industrial accident. He was, in effect, making delivery of the cargo to the consignee's truckman, which is the obligation of the shipping company, which obligation was contracted to the terminal operator. Holding that Caputo was engaged in longshoring operations is sufficient to uphold the decision of the Court of Appeals.

In the case of Respondent Blundo, Petitioner insists that the Amendments do not extend coverage to new categories of maritime employment. This position is expressly negated by the Committee reports at least as far as checkers are concerned. (Petitioner concedes that Respondent Blundo is a checker, see Blundo brief at p. 4). The Senate and House Committee reports both specifically included a checker within the amended coverage provisions of the Act, H.R. Rep. No. 92-1441, *supra*, at 11; S. Rep. No. 92-1125, *supra*, at 13.

The fact that a container was involved is not relevant. Stripping and stuffing a container is the functional equivalent of loading cargo on to a vessel and of sorting cargo discharged from a vessel. The use of containers permits a faster "turn around" time for a vessel by expediting the loading or unloading procedure of the vessel. The very

nature of containerization requires that more of the work that was previously done on board a vessel must now be done within the terminal area adjacent to where the vessel loads and unloads. Congress explicitly recognized this feature of containerization in S. Rep. No. 92-1125, at 13:

> "It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoremen's work is performed on land than heretofore."

The container is removed from the ship and then completely unloaded (stripped) on land. This is no different than the procedure involved before containerization, where the cargo was palletized and the pallet was removed from the vessel and had to be placed within the terminal area, again for the purposes of effecting delivery to a consignee's truckman.

At the time Respondent Blundo was injured, he was specifically engaged in walking around a container after breaking the seal on said container for the purpose of being stripped. He slipped and fell on ice within the terminal area while engaged in this longshoring operation. All of the cases in the First, Second, Third, Fourth and Fifth Circuits bearing on this point of law are in accord, *Stockman* v. *John T. Clark & Son,* 539 F. 2d 264 (1st Cir. 1976); *Pittston Stevedoring Corp.* v. *Dellaventura, supra; Sea-Land Service, Inc.* v. *Director, supra; I.T.O. Corp.,* v. *Benefits Review Board, en banc* decision, 542 F.2d 903 (4th Cir. 1976); *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F.2d 533 (5th Cir. 1976).

B. *The "Point of Rest" Theory Relied on by Petitioners Is Erroneous.*

The "point of rest" theory used by Petitioners to limit the scope of maritime employment, has been expressly rejected by four out of the five Courts of Appeals to which it has been presented, see *Pittston Stevedoring Corp.* v. *Dellaventura, supra* (2nd Cir.); *Sea-Land Service, Inc.* v. *Director, supra* (3rd Cir.); *Stockman* v. *John T. Clark & Son, supra* (1st Cir.); and *Jacksonville Shipyards, Inc.* v. *Perdue, supra* (5th Cir.). Even the Fourth Circuit, which accepted the "point of rest" theory, *I.T.O. Corp.* v. *Benefits Review Board,* 529 F.2d 1080, after an en banc rehearing, modified the "point of rest" to include the stuffing and stripping of containers, 542 F.2d 903, at 905, cert. pending (Nos. 76-706 and 76-730). The only other circuit to render a decision on this jurisdictional point is the Ninth Circuit in *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957 (9th Cir. 1975), cert. denied, 45 U.S.L.W. 3254 (1976). In the latter case, the facts and circumstances are completely different from the instant cases and did not involve longshoremen or longshoring operations. It is therefore distinguishable on its facts from the instant case, as pointed out by Judge Friendly in his decision, *Pittston Stevedoring, supra,* 544 F.2d, at 39.

Petitioners have cited numerous reports, contracts and other authorities to show that the "point of rest" is a commonly used and widely accepted term in the longshore industry. They have repeatedly argued that Congress was aware of the "point of rest" when it adopted the 1972 Amendments and therefore intended to extend coverage only up to the "point of rest." But their attempt to show that this theory was known throughout the industry and accepted by all those who work in the industry,

including the International Longshoremen's Association is negated by the Senate and House reports, as well as by the entire legislative history. Nowhere in the Committee reports is the so-called "point of rest" theory mentioned. Further, if it were so open and notorious and in the minds of everyone present at the time that the Amendments were under advisement, why wasn't such phraseology used at one time or another during the presentation of the position of either the employers or the ILA union representatives before each Committee of the Senate or House of Representatives?

The simple answer to Petitioners' argument is the one provided by Judge Craven in his dissent from the panel decision in *I.T.O. Corp.* v. *Benefits Review Board,* 529 F.2d 1080, namely:

> "If Congress, as appellants claim, meant to embrace the concept of the 'point of rest' as a demarcation line between 'maritime' and 'nonmaritime' employment, why was this 'generally understood' doctrine not explicitly written into Section 902(3) of the Act, defining 'employee,' or at the very least, mentioned in the legislative reports? *Surely a concept of such alleged widespread use and application is too conspicuous by its absence to be read into the statute.* This Court has no license to find in a statute words which the Congress did not put there." (at 1096, emphasis added)

Petitioners rely heavily on a Task Force Report of the Office of Workers' Compensation Programs (OWCP) to substantiate the "point of rest" theory. The Petitioners have taken out of context certain phrases used in an appendix of the Task Force Report but fail to mention

the definition of employee listed in Appendix A at page 98 of the Report:

> "Employee. Any person engaged in maritime employment, including any longshore worker or other person engaged in longshoring operation . . . "

This is basically the same definition as that being reviewed herein.

Respondents submit that the purpose of this report was simply to advise the Secretary of Labor of the problems that existed in the Office of Workers' Compensation Programs and to make recommendations for changes that would expedite the handling of cases under the Act. This is apparent in two transmittal letters dated December 15, 1976. The letter of John B. Mumford, Chairman, Departmental OWCP Task Force, clearly sets forth the assignment he was given:

> "Six months ago you asked me to establish a Departmental Task Force to undertake a thorough assessment of the operational problems which have impeded the Office of Workers' Compensation Programs in the conduct of its responsibilities under the Longshoremen's and Harbor Workers' Compensation Act.
>
> The Office of Workers' Compensation Programs Task Force has now completed its assessment and has developed a comprehensive set of recommendations which we feel will result in significant improvements in program performance. The report documenting these conclusions and recommendations provides a thorough, comprehensive series of action-recommendations . . . "

It is submitted that this particular Task Force Report is of no significance to the issues and should not be used as a basis for this Court's decision herein.

Further, all the cases cited by the Petitioner in Blundo on pages 54-57 of its brief to support the "point of rest" theory deal with a longshoreman's ability to avail himself of the unseaworthiness doctrine in third party actions. Whatever validity, if any, the "point of rest" theory has to the unseaworthiness doctrine, it has none when applied to the payment of compensation benefits under the LHCA. Under the seaworthiness doctrine, a longshoreman had to show he was acting in service to a ship to obtain recovery against the ship. However, under the amended Act, there is no such limitation. An employee must simply show that he is engaged in maritime employment. Included in maritime employment are longshoring operations. As we have shown above, longshoring operations encompass all the activities involved in moving, handling and processing cargo. They are not limited to those operations which are in service of a vessel.

The "bucket brigade" analogy which counsel for Amicus, West Gulf Maritime Association, utilizes is a gross oversimplification of the facts of life on the waterfront and consequently just does not merit consideration. The two cases relied on exclusively by counsel, involved the pre-1972 Act where coverage existed only if the accident occurred over the navigable waters (and beyond the pier). The 1972 Amendments removed this limitation. These same two cases can now be read to support Respondents. If the railroad workers were covered while they were over navigable waters under the old Act, they would continue to

be covered for the same activities now performed on land under the shoreward extension of the 1972 Amendments.

Finally, Petitioners argue that since the "point of rest" is widely used, it would be applied with consistency and certainty. But counsel for the Petitioner in Blundo makes two very important observations about the "point of rest" (Blundo brief at 36-37), which we believe would negate the very consistency and uniformity which Congress was trying to achieve when it amended the Act. First, the "point of rest" is not that location at the ship's side from which or to which cargo is loaded or unloaded. Rather, it is some other *temporary* storage or holding area. Second, Petitioners say it is not a geographic concept, but rather a functionally determined point. These two observations show quite clearly that the "point of rest" will vary from port to port and according to the nature of the cargo involved. It will also vary depending on whether the cargo is containerized or not, see Judge Craven's dissent, *I.T.O. Corp., supra* at 1096.

The "point of rest" would vary according to the whim of each and every individual employer. It would appear to be inconceivable that Congress would permit the expansion of the territorial limits of what constitutes navigable waters to be left to the independent judgment and/or manner of operation of each stevedoring company and/or terminal operator. The litigation involved herein indicates immediately the abuse which could be fostered by employers upon the coverage provisions of the Act, upon the intention of Congress to create a uniform system of compensation and upon longshoremen themselves who would again be walking in and out of coverage under the Act. It could be readily seen that each and every employer would immediately revise its operational system in such a

way as to make the "point of rest" as close to the vessel as possible, thereby limiting the compensation liability imposed by the amended provisions of the Act as much as possible.

As a concrete example of the inconsistency inherent in the "point of rest" theory, Respondents suggest the following: Assume certain cargo which had been unloaded from a vessel was taken to a shed to await further trans-shipment. Next to it in the shed was cargo waiting to be loaded on board a vessel. Assume further the cargo awaiting trans-shipment had remained in the shed 133 days. (Judge Friendly indicated such a time delay might have necessitated a decision against Dellaventura had the merits been reached in his case, *Pittston Stevedoring, supra,* 544 F.2d at 54, note 24.) Two longshoremen are working in the shed. One is moving the unloaded cargo to a truck for trans-shipment and the other is moving the other cargo to a vessel to be loaded. The cargo stored 133 days falls, injuring both longshoremen. Would only one longshoreman receive benefits under the Act because he was moving cargo from the "point of rest" to the ship? Would neither be covered because the cargo causing the injuries was beyond Petitioner's so called "point of rest"? Would both be covered if they have been injured, instead, by the cargo which was moving toward the ship?

Under the position of the B.R.B. both longshoremen would be covered regardless of which cargo was involved. We believe this to be the correct result. We submit that adopting the "point of rest" theory would directly contravene and frustrate Congress' attempt to provide uniform coverage to all longshore workers.

C. *Both Ralph Caputo and Carmelo Blundo Were Injured Upon Navigable Waters of the United States as Now Defined.*

Counsel for the Petitioner in case No. 76-444 concedes that Respondent Caputo was injured on the navigable waters as now defined.

> "The situs of Caputo's accident unquestionably met the requirement of Section 3(a) of the Act, 33 U.S.C. 903(a), because the terminal adjoins navigable waters of the United States and parts of the terminal area are used in loading and unloading ships." (Caputo Brief, p. 3, footnote 1)

On the other hand, counsel for Petitioner in No. 76-454 argues that Respondent Blundo was not injured at a situs covered by the Act. This is alleged because the pier where Blundo was injured was not "customarily used" in loading or unloading a vessel. Petitioner makes a fundamental error of statutory construction in so reading the statute. Further, Petitioner apparently heavily relies on the fact that the container was moved by an independent trucker over city streets.

The area covered under the term navigable waters, as far as the LHCA is concerned, has been expanded to include:

> "any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel." 33 U.S.C. 903(a).

There is no question or dispute that Blundo was injured on the 19th Street side of the pier terminal known as 21st

Street Terminal. Thus, he was injured on an area specifically included within the term navigable waters.

Petitioner attempts to read Section 903(a) as requiring all the specifically enumerated areas to be customarily used by an employer in loading or unloading a vessel. However, the phrase "customarily used" refers only to "other adjoining areas." It does not refer to "any pier . . . " etc. To read the Act as Petitioner contends would require a disregard of Congress' double use of the word "adjoining." In fact to read it as Petitioner contends makes the entire enumeration surplusage, since it would have been sufficient for Congress to say, "any adjoining area customarily used in loading, unloading, repairing or building a vessel." This Congress did not do. It specifically enumerated certain adjoining areas, of which a pier was one, and then included "other adjoining areas customarily used . . . "

Even in the Fourth Circuit Court of Appeals, which accepted a modified "point of rest" theory, the above reading of Section 903(a) was apparently adopted, *I.T.O. Corp., supra,* 529 F.2d, at 1083-4.

The First Circuit in a case involving circumstances almost identical to those in Blundo reached the same result, *Stockman* v. *John T. Clark & Sons, supra.* In *Stockman,* the claimant was injured while physically stripping a container. Blundo, working as a checker, was also injured while involved in the stripping of a container. The container in *Stockman* had been discharged from a vessel approximately three days before the accident, at a facility approximately two miles by land from the place of injury. In the case herein, the container was similarly discharged

from a vessel at a different place and, due to the nature of the cargo, transported overland to the bonded warehouse at the 21st Street pier. The Court in *Stockman* clearly held "that the situs requirement of Section 903(a) was plainly met, in spite of the distance separating Berth 5 of the Boston Army Base from the Sea-Land berth at Castle Island." 539 F.2d, at 271. Further the Court said:

> "On the question of situs, the simple fact is that the amended Act defines navigable waters to include 'any adjoining pier, wharf . . . terminal . . . or other adjoining area customarily used by an employer in loading (or) unloading . . . a vessel.' Section 903(a). 'Adjoining' can only refer to navigable waters; and Stockman was, as even Clark concedes, working at a terminal which adjoined navigable waters. To be sure, the final reference to 'other adjoining area customarily used by an employer in loading (or) unloading . . . a vessel,' as well as other parts of the statute, suggests that Congress had in mind a terminal associated with the shipboard movement of marine cargoes. But we do not think Congress meant necessarily to limit 'adjoining' to only those areas directly adjoining the berth of the specific vessel being unloaded . . . We are not faced with the stripping of a container at an inland freight depot having only some incidental connection with navigable waters. We therefore conclude, from all these factors, that the situs requirement of Section 903(a) has been met." *Id.* 272.

Similarly, Blundo was injured at a situs, a pier, specifically enumerated.

Further, even if a pier must be customarily used in loading and unloading, as shown above the activity in

which Blundo was engaged was part of the loading and unloading process. Stripping a container is the functional equivalent to unloading a vessel and this is what was being done at the pier. Thus, even under Petitioner's erroneous reading of Section 903(a), Blundo was still injured at a covered situs.

III.

The economic argument is one which is not properly addressed to this Court, but rather should be addressed to Congress.

Petitioner in Blundo, as well as the Amicus Curiae, argue that because of the interpretation adopted by the Department of Labor, and by the Courts of Appeals, the costs of compensation insurance has increased significantly. But as they themselves point out, Congress considered the question of a possible increase in compensation insurance.

Congress was aware that insurance rates would increase. Congress clearly intended to substantially raise the benefit levels from the $70.00 a week then provided. The first year alone, would see a minimum of a doubling of the compensation payment for covered workers, and the payment would continue to rise in 1973-74-75. In addition, Congress intended to expand the number of workers who would be covered by moving the jurisdictional line shoreward.

Congress certainly knew this would result in increased insurance costs. In order to offset the increase, third-party actions based on the unseaworthiness doctrine were eliminated. Both sides, employers and employees, accepted

the quid pro quo which Congress worked out. Both sides felt they had gained from the respective trade-offs. The employers accepted higher benefit levels and an extension of coverage shoreward in return for the elimination of the unseaworthiness claims by longshoremen. The employees accepted the reverse.

In retrospect, the employers feel they made a bad decision and now ask this Court for relief. Respondents submit that the employers are presenting their argument in the wrong forum. On the record herein, this Court is simply not in an appropriate position to even consider the argument. This Court can only review the record and determine whether the decision below is supported by substantial evidence in the record. See Point I, *supra*. The Task Force Report, *supra*, and the various reports of an increase in insurance rates are not in the record. Further, individual Respondents are not in a position to have access to such information as relied on by Petitioners, in order to rebut the contentions of Petitioners.

If Petitioners feel that Congress inadequately or improperly judged the probable rise in insurance payments the employers would have to pay, their remedy would be to address their grievance to Congress. Let them present to Congress their "point of rest" theory and face the representatives of employees before Committees of Congress empowered to hear evidence and make proper recommendations, rather than place on injured employees the burden of this expensive protracted litigation.

CONCLUSION

For the above reasons, Respondents Caputo and Blundo respectfully submit that the judgment of the Court below in these cases be affirmed with costs and attorneys' fees to Respondents as provided by 33 U.S.C. 928(a), (b). The fee application will be submitted under separate cover.

Respectfully submitted,

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